Supreme Court, U. S.
FILED
NOV 19 1975
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1975
No. 74-1107

FRANCIS LEO CAPPAERT, MARILYN I. CAPPAERT, *et al.*,
Petitioners,

vs.

UNITED STATES OF AMERICA.

STATE OF NEVADA *ex rel.* ROLAND D. WESTERGARD,
State Engineer,
Intervenor [*and Petitioner in No. 74-1304*].

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

PETITIONERS' REPLY BRIEF.

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PETITIONERS' REPLY BRIEF.

This is a reply brief. It will therefore not simply parrot the points already made on the Cappaerts' behalf, nor resort to any step-by-step debating point rebuttal of the contentions adduced by the United States. Rather, it will direct itself only to such of the government's arguments as most urgently require correction.

By way of preliminary, counsel for the Cappaerts ventures to obtrude a personal note. Some time back, a lawyer friend of his, who had appeared both for and against the United States in this Court, submitted

the following analysis. "What the government says in its briefs is an invaluable guide to its evaluation of the intrinsic worth of your own contentions. Whenever it feels reasonably sure of its ground, it will answer you in the body of its brief. If you have caused its representatives to worry, their reply will be relegated to a footnote. But, if you ever succeed in really scaring government counsel, then their invariable answer is silence."

The brief of the United States in the present cause conforms perfectly to the foregoing analysis.

At the outset the Cappaerts deem it necessary to point out to the Court that the government's twice repeated statement that the entire population of *Cyprindon Diabolis* inhabit Devil's Hole (U.S. Br. 3, 4) is not true. No citation to the record to support such statement appears in the government brief.

Finding 27 does state that "Transplant of the Devil's Hole pupfish has not to date proven to be a successful alternative course of action for the preservation of the Devil's Hole pupfish" (A. 365). In footnote 2 (U.S. Br. 4, 5) the government claims such finding is supported by substantial evidence and refers the Court to "App. 121". The Cappaerts are not, of course, now disputing the finding, but the government has neglected to tell the Court that the substantial evidence referred to was given at a hearing in July, 1972 and that in October, 1972 there was a transplant of pupfish from Devil's Hole to the Hoover Dam Refugium (1973 Tr. 50; not printed) and at hearings on July

1, 2, 1973, three days before the entry of the Preliminary Injunction (A. 4) the government's expert witnesses testified that although they could not then qualify the transplant as a success because there had been only two generations of pupfish in the refugium, they had multiplied and appeared to be thriving and there were approximately 170 pupfish in the refugium as of April, 1973 [1973 Tr. 50-53, 256-257, 260; not printed; Deft. 1973 Ex. E].

I.

THE HEART OF THIS CASE IS THE 1952 PROCLAMATION, AND THAT DOCUMENT, BOTH IN ITS TEXT AND IN ITS LEGAL SETTING, CLEARLY ESTABLISHES THAT IT DID NOT RESERVE ALL UNDERGROUND WATER FROM AN AQUIFER 4500 SQUARE MILES IN EXTENT.

Accepting solely for purposes of argument under the present heading, the proposition that (U.S. Br. 19) "the United States may, by reservation of public lands, also reserve such appurtenant waters as are required to accomplish the purposes for which the federal reservation was created", we turn to the text of the 1952 Proclamation (Pet. App. C1-C3).

The government's fragmented discussion of this, the basic document (U.S. Br. 5-6, 40-41), studiously avoids consecutive and hence meaningful examination of its terms. The Cappaerts will therefore reexamine the text of the 1952 Proclamation, standing alone, and will then view that instrument both in its contemporaneous legal setting as well as in the context of the physical facts involved in the present case.

A. The Text of the 1952 Proclamation Mentions Pupfish Only to Confirm the Remarkable Geological Significance of the Devil's Hole Pool That It Reserved, and Neither Declares Them to Be of Scientific Interest nor to Be Themselves Worthy of Protection.

The Cappaerts have already addressed themselves to the consecutive text of the 1952 Proclamation in unfragmented fashion (Capp. Br. 58-62); in order to avoid repetition and to spare this Court the burden of an overly lengthy reply, they respectfully incorporate that discussion by reference, and ask that it be read—or, if necessary, reread—at this juncture.

The short of the matter is that there is not a single word in the controlling 1952 Proclamation that designates the pupfish as independent objects of scientific interest, nor indeed even so much as a syllable therein that declares them either as worthy of or as entitled to protection.

Actually, the pupfish appear only in the fourth preamble of that Proclamation, where they are invoked simply as "geologic evidence" (Pet. App. C1) to confirm the geological importance of "this subterranean pool" (*ibid.*)—which alone is being set aside and reserved. The presence of the pupfish is not mentioned as being of either ichthyologic or biologic or zoologic evidence, nor of having substantive importance in those latter areas.

The government's reliance on Finding of Fact 9 (A. 362), which indeed recites that the preservation of the pupfish was one of the purposes of the reservation of Devil's Hole, is misplaced—for two reasons.

First, we are dealing here with the construction of a written document, resolution of which involves, not

matter of fact, but only a question of law. That much is hornbook learning, not requiring citation of authority.

To the extent that Finding 9 at A. 362 is duplicated by Conclusion of Law 3, A. 367, the latter constitutes a plain and indeed palpable misreading of a written instrument that a reviewing court is obviously free to interpret for itself, correcting the error committed below.

Second, insofar as the outside sponsors urging the reservation of Devil's Hole were concerned, it is undoubtedly true that *their* purpose was indeed the preservation of the pupfish, and that, being fully aware that in 1952 there was no legislative authority to set aside public land for the purpose of protecting rare or endangered species, they resorted to the subterfuge of stressing the geological significance of Devil's Hole. Here also, it seems sufficient simply to incorporate by reference, without argumentation or repetition, the pertinent evidence set out at Capp. Br. 62-64.

But the Cappaerts do find it necessary to point out a number of significant inaccuracies in the government's footnoted answer (U.S. Br. 40 note 35) to that evidentiary demonstration.

1. The suggestion that "the pupfish are prominently mentioned in the proclamation" had better be considered, certainly by any reader of the actual document, as simply an instance of over-exuberant advocacy.

2. It is similarly contrary to the record to suggest that the evidence of the ichthyologists' pretext and subterfuge is hearsay, to which objection was sustained. The cited ruling (A. 132) applied to only a single question and answer. All of the rest of the proof adduced at Capp. Br. 62-64 was admitted for all purposes.

3. Finally, the contention that "if federal officers ever had considered using the 'travertine formation' as a pretext for saving the pupfish, they obviously dropped those plans for * * * the proclamation is devoid of any mention of a 'travertine formation' " (U.S. Br. 40 note 35), betrays a lamentable lack of acquaintance with elementary geology.

The Proclamation declares Devil's Hole to be unique and, further, that it "is unusual among caverns in that it is a solution area in distinctly striated limestone" (Pet. App. C1). True, the word "travertine" does not appear—but travertine is simply limestone in any form of English! *The Random House Dictionary* (1966 ed., p. 1508) defines travertine as "a form of limestone deposited by springs". *The Oxford Universal Dictionary* (1955 ed., p. 2236) similarly states that travertine is "A white or light-coloured concretionary limestone, usu. hard and semi-crystalline, deposited from water holding lime in solution". Consequently the travertine formation put forward by the pupfish protagonists *did* obtain mention in the Proclamation, even though only its generic name was used.

There is, however, an area of agreement between the parties, viz., the government's statement (U.S. Br. 40 note 35) that "the evidence shows only what private individuals urged the government to do—it does not show what government officers actually did."

True enough; what the government officers did is shown by the text of the Proclamation—and that document, fairly read, shows only that the presence of the pupfish was further confirmation "that this subterranean pool is an integral part of the hydrographic history of the Death Valley region" (Pet. App. C1).

That is to say, the ichthyological enthusiasts did not succeed in making either the draftsmen of the 1952 Proclamation or President Truman himself into even unwitting participants in their scheme of dissimulation.

Indeed, they succeeded only in deceiving the courts below, both of whom rewrote the 1952 Proclamation by reading into it concern for endangered species not voiced by either Congress or the executive until many, many years afterwards. See Fdg. 28 (A. 365-366) and Conc. 9 (A. 367-368); C. A. 9 Op. *Passim*, but esp. at Pet. App. A1, A2, A4, and A7.

B. The Legislative History of the Only Statutory Authority on Which the 1952 Proclamation Purported to Rely Wholly Negatives Any Power to Set Aside Public Land for the Protection of Living Species.

The Cappaerts demonstrated (Capp. Br. 64-73) that the act for the preservation of American antiquities (Act of June 8, 1906, c. 3060, 34 Stat. 225, 16 U. S. C. §§431-433; Pet. App. D1-D2) originated as the proposal of a consortium of archeological societies seeking legal sanction for the preservation of prehistoric artifacts, and that this measure was wholly insufficient to authorize any reservation of public lands for the protection of any living species whatsoever.

To this the government replies (U.S. Br. 38) that the legislative history is "brief", and that *Cameron v. United States*, 252 U.S. 450, is authority against the Cappaerts (U.S. Br. 39). Thereafter—in a footnote (U.S. Br. 39 note 34)—it invokes the rule that great weight is to be accorded consistent administrative construction.

None of these contentions survives examination.

1. Although the Senate Report on the bill (S. Rep. No. 3797, 59th Cong., 1st sess.) is indeed brief, it is consistent only with the Cappaerts' contentions; it negatives those of the government.

There was no Senate debate, but the House Report (H. R. Rep. No. 2224, 59th Cong., 1st sess.), *non constat* the government's assertion, was voluminous. Only brief excerpts were set forth by the Cappaerts (Capp. Br. 68-69), but those were representative, and they presented the basic objectives of the bill—which were purely archeological. Anyone doubting that assertion is urged to examine the whole of the House Report.

Significantly, the government found nothing therein to quote against the Cappaerts. That circumstance should not occasion surprise. After all, this was legislation to preserve relics of the dead past, not to protect living creatures of any kind or description.

2. True, *Cameron v. United States,* 252 U.S. 450, is *contra* insofar as it interprets the act to include natural but inanimate phenomena, as the Cappaerts were at pains to point out (Capp. Br. 70-71). But the Court there, so far as its opinion discloses, did not undertake to examine the legislative history of the 1906 Act; the government, which has easy access to the briefs in the case (which litigants in Nevada do not), has referred to nothing in those briefs to the contrary; and, in the light of the very clear and unequivocal House Report, the conclusion is well-nigh inescapable that when Congress used the words "objects of historic or scientific interest", it had only artifacts in mind, not natural phenomena, much less any living creatures. For the statute contemplated "permanent preservation in

public museums", an objective appropriate for prehistoric artifacts of peoples long since vanished from the earth—but wholly impossible in respect of animals sought to be protected from extinction.

Indeed, even the *Cameron* case, which never referred to the legislative history, only included natural formations within "objects of historic or scientific interest". Nothing said in that opinion supports the government's present effort to include among American antiquities a species of marine life whose life span does not normally exceed a single year (A. 126).

3. The concept of a settled administrative construction, that cherished refuge of the overenthusiastic public functionary, here once again dusted off, collides in this instance with a countervailing principle, now conveniently overlooked. For, as this Court has pointed out, "Illegality cannot attain legitimacy through practice." *Inland Waterways Corp. v. Young,* 309 U.S. 517, 524. In view of the intent of the Congress that passed the act for the preservation of American antiquities, an intent unmistakably set forth in H. R. Rep. No. 2224, 59th Cong., 1st sess., the Cappaerts submit that it is the proposition last quoted that governs here.

Simply not to allow the matter to go by apparent default, the Cappaerts note that the government once again (U.S. Br. 41) relies on the generalized provisions of the 1916 Act creating the National Park Service (16 U.S.C. §1; Pet. App. D6) in its continuing attempt to broaden the scope of the 1952 Proclamation so as to include living organisms in a text that plainly does not do so by its terms.

The Cappaerts believe that they have already adequately disposed of that untenable effort (Capp. Br.

72-73). But they wish particularly to commend to the Court the treatment of the 1916 Act by Arizona and ten other States at pp. 17-21 of their brief *amici curiae* herein. Particular attention is directed to their showing that official National Park Service instructions lay down a policy that its personnel "should adhere religiously to state law with respect to the establishment and maintenance of water rights for use on lands under their jurisdiction".

C. The 1952 Proclamation Could Not Have "Intended" to Reserve Any Water Rights, Because at That Time the Rule of the California Power Case in 295 U.S. and of the Decisions Following It, to the Effect That Congress Had Ceded to the Arid-Land States All Jurisdiction Over Non-Navigable Waters Within Their Borders, Was Still Fully in Force.

As the Cappaerts have already shown in detail (Capp. Br. 29-37), this Court, beginning with *California Power Co. v. Beaver Cement Co.*, 295 U.S. 142, decided in 1935, and down through the *per curiam* in *Dority v. New Mexico ex rel. Bliss, State Engineer*, 341 U.S. 924, May 7, 1951, had consistently ruled that Congress by the several Desert Land Acts effected a severance of land and water on the public domain in the arid-land Western third of the country, ceding jurisdiction over all non-navigable water to the several States involved.

How—anywhere—does the government deal with the *California Power* decision? In, characteristically enough, a footnote (U.S. Br. 27 note 21), wherein the effect of that decision is sought to be minimized because it was "a case between private parties in which the United States did not participate".

The Cappaerts cannot forbear to mention that this suggestion obviously reflects a weird confusion between *stare decisis* and *res judicata;* they had not previously supposed that the United States is wholly unaffected by rules of law laid down in any case in which it is not itself a litigant.

But if that circumstance is now to be deemed a prerequisite to the precedential force of this Court's decisions, then the Cappaerts beg leave to refer to *Ickes v. Fox*, 300 U.S. 82, already invoked by them (Capp. Br. 35), but not even accorded footnote treatment in the government's brief. Instead, *Ickes v. Fox* receives the high tribute of silence.

Let us see why the government steams full speed astern from *Ickes v. Fox* at the present juncture. That was a case in which Mr. Ickes, then Secretary of the Interior, was petitioner, and in which he was represented by, *inter alia*, the Solicitor General. And that was a case, be it noted, in which a unanimous Court declared (300 U.S. at 95) that, by the Desert Land Act of 1877.

> "if not before, Congress had severed the land and waters constituting the public domain and established the rule that for the future the lands should be patented separately. Acquisition of the government title to a parcel of land was not to carry with it a water-right; but all non-navigable waters were reserved for the use of the public under the laws of the various arid-land states."

Decision going against the Secretary, the Solicitor General was impelled to take a step which, however commonplace for private litigants, has over the years been only rarely availed of by the government's prin-

cipal representative before this Court: He petitioned for rehearing. That step obtained only a slight modification of the opinion, but not in respect of the passage just quoted; in all other respects the petition for rehearing was denied (300 U.S. 640).*

More than that, the doctrine that the Desert Land Acts "effected a severance of all waters upon the public domain, not theretofore appropriated, from the land itself", was, following *Ickes v. Fox*, several times reaffirmed by this Court. *Nebraska v. Wyoming*, 325 U.S. 589, 612; *United States v. Gerlach Live Stock Co.*, 339 U.S. 725, 734; *Dority v. New Mexico ex rel. Bliss, State Engineer*, 341 U.S. 924.

The Cappaerts cited each of those later decisions (Capp. Br. 35-37). In reply (U.S. Br. 27 note 21), the government pays all of these, likewise, the compliment of silence, preferring to rely instead on two earlier rulings of the court below, plus one district court case whose holding was dictum at most—inasmuch as its order of dismissal was affirmed only because it had no jurisdiction to entertain the action! *State of Nevada v. United States*, 165 F.Supp. 600 (D. Nev.), 279 F.2d 699 (C.A. 9), discussed at Capp. Br. 50.

The severance doctrine, set out at some length at Capp. Br. 29-37, and, as has been shown, treated here by the government with a combination of footnote treatment plus some deafening stillness, survived until June 1955. Then, with every member of the *California Power* Court and of the *Ickes v. Fox* Court departed

*In view of *Cherry Cotton Mills v. United States*, 327 U.S. 536, and of *Rainwater v. United States*, 356 U.S. 590, the Cappaerts will not assume that the government ignores *Ickes v. Fox* simply because, having regard to *United States v. Lee*, 106 U.S. 196, the petitioner in that case was an officer of the United States rather than the United States *eo nomine*.

from the scene, *Federal Power Comm. v. Oregon*, 349 U.S. 435, determined that the severance doctrine did not apply to withdrawn lands.

The Cappaerts have shown (Capp. Br. 41-45) that this later decision rested on a controlling mistake of fact: The Court was quite unaware that by 1955 there no longer remained a single square foot of public land that had not been withdrawn for some purpose or other. There was by then no more unappropriated public land.

The Cappaerts remain of opinion, for reasons fully articulated in their brief (Capp. Br. 37-55), that the earlier or severance doctrine was soundly based in law, and that it should be reaffirmed and restored to full vitality.

They share the view, expressed here by no less than 16 States of the Union, 15 of which appear in their support, the 16th being the State of Nevada, intervenor below and now joint petitioner in No. 74-1304, that the implied reservation doctrine here being urged by the government to its ultimate limits in every kind of situation whatsoever, poses serious dangers to the future of the entire Western third of the Nation. That doctrine is uncertain in extent, as the present record dramatically discloses. That doctrine disregards the universally established Western rule of beneficial use. The Cappaerts respectfully urge on this Court the thoughtful discussion of those factors in the brief *amici curiae* filed in this cause by Arizona and 10 other States.

But—however vital it is to the continued existence of the entire arid-land third of the country that the implied reservation doctrine be very sharply limited, and that the earlier severance rule of *California Power*

Co. v. Beaver Cement Co. and of *Ickes v. Fox* be resurrected and revitalized, it is not necessary for the Cappaerts to pursue that issue here.

It is sufficient for the Cappaerts to put forward a much narrower proposition. All that they need to urge here, indeed all that they need to obtain reversal of the judgment below, is acceptance of their contention that the 1952 Proclamation, to be properly interpreted, must be construed in the light of the law then in force, and must not be rewritten by anachronistic after-readings.

The date of that controlling instrument was January 17, 1952.

Less than nine months earlier, on May 7, 1951, the Court had, in *Dority v. New Mexico ex rel. Bliss, State Engineer*, 341 U.S. 924, dismissed the appeal from *State v. Dority*, 55 N.M. 12, 225 P.2d 1007, on the ground that it did not involve a substantial federal question, citing *California Power Co. v. Beaver Cement Co.*, 295 U.S. 142.

Thus, when the 1952 Proclamation was signed, it was still the law that, when Congress had through passage of the Desert Land Acts effected the severance of land and water on the public domain, it had ceded jurisdiction over all such water, being non-navigable, to the several arid-land States. See Capp. Br. 29-37. And, at that time—January 1952—the single implied reservation case up to then decided, which antedated *California Power* by over a quarter of a century, had been specifically rested on the specialized principle that agreements with Indian tribes were to be construed in those tribes' favor. *Winters v. United States*, 207 U.S. 564.

It was not until more than three years after the basic January 1952 Proclamation in this case that there was any extension of the implied reservation doctrine, that there was announced, however unwitting it may have been, any limitation on the severance-and-cession-of-jurisdiction doctrine. *Federal Power Comm. v. Oregon*, 349 U.S. 435, June 1955.

Consequently, looking at the January 1952 proclamation in the light of what was intended thereby at the precise moment when it was signed by the President, any knowledgeable land law practitioner would have been bound to conclude that it reserved only the 40-acre tract specified therein, and that no one who drew it or signed it ever for a single moment "intended" to reserve even a single drop of water. For, with the limited exception of lands dealt with pursuant to agreements with Indian tribes, jurisdiction over all non-navigable water, by every pronouncement emanating from this Court up to that time, had long since been transferred by Congress to the several arid-land States.

It therefore follows that, regardless of whether, on the one hand, the severance doctrine of *California Power* and of *Ickes v. Fox* is reestablished and reaffirmed, regardless of whether, on the other, the Court eventually adheres to the unlimited doctrine of implied reservation expounded in later cases, the ruling below must still be reversed.

Because, when Devil's Hole was reserved, the severance rule, with its concomitant cession-of-jurisdiction doctrine, was unquestioned law. Therefore the 1952 Proclamation cannot be construed as reserving any water whatever, because, under the law then in force, the United States owned no non-navigable water that it would reserve. Under the law as it stood in 1952,

plenary power to dispose of all such water, being non-navigable, had long since been ceded to the several arid-land States.

To read into the 1952 Proclamation concepts of water law first formulated in 1955 and thereafter would, very obviously, give that document an improper post-dated effect.

The same erroneous and indefensible result follows from the effort to read into the 1952 Proclamation environmental concerns that were first articulated by the Congress in 1966, see Capp. Br. 13-15, or to interpret that Proclamation in the light of the pupfish having been declared an endangered species, a declaration that followed the January 1952 Proclamation by no less than 18 years plus 9 months (35 Fed. Reg. 16047, October 13, 1970).

Yet both of those retroactive factors are recited in the findings and conclusions that were approved below (Fdg. 28, A. 365-366; Conc. 9, A. 367-368).

Thus, up to now, the Cappaerts have been victims of what can only be described as judicial *ex post facto* action.

D. The Ruling Below Gives the 1952 Proclamation the Effect of Reserving, in Connection With the Setting Aside of a 40-Acre Tract, All of the Underground Water From an Aquifer 4500 Miles in Extent, a Result Necessarily Flowing From the Criteria Approved Below, but in Direct Conflict With the Specific Terms of the Statute on Which That Proclamation Was Rested.

It is of course true that the wells currently identified as affecting the Devil's Hole water level are within two and a half miles thereof (Fdg. 31, A. 366, cited at U.S. Br. 12). But that is only because, as the map following Capp. Br. 97 shows, the Cappaerts' farm is near Devil's Hole.

Moreover, to speak simply of two and a half miles (U.S. Br. 12) as measuring the scope of the decree now assailed minimizes its true scope in several important particulars.

First, that decree by its explicit terms limits drilling and pumping on no less than 21 specified sections; see Pet. App. No. 74-1304, p. xx. The Cappaerts' ranch consists of 12,000 acres (Opinion below, Pet. App. A. 2). Since every section of public land is 640 acres in extent, the decree affects 13,440 acres and thus the Cappaerts have been effectively enjoined from the use of their entire farm. (In terms of square miles, of course, 21 sections come to precisely 21 square miles.)

Second, the limitation imposed on the Cappaerts' pumping from that entire area is couched in terms of the resultant water level at Devil's Hole, regardless of a particular well's distance from the 40-acre reservation set aside in 1952.

That water level was twice fixed by the district court at 3.0 feet below the marker (A. 4, 5 [June 5, 1973]; Pet. App. No. 74-1304, pp. xix-xx [April 9, 1974]). It was that high 3.0 feet level that led to repeated—and repeatedly successful—applications to the court below for a 3.3 feet level in order to protect the Cappaerts' farming activities; see Capp. Br. 20-22 for details.

And that water level limitation over which the contest raged in the lower courts must be considered, not in the abstract, not in a vacuum, but in the light of the finding that "future wells in other areas of the ranch may have an adverse effect on the water level in Devil's Hole" (Fdg. 22, A. 364). Moreover,

according to the U.S. Geological Survey's hydrologist, called as the government's lead-off expert witness, any substantial pumping anywhere within the 4500 square mile aquifer will in time affect the water level in Devil's Hole (A. 78-80, 99-101). But, according to this same expert, the precise effect of such pumping, whether close or distant, cannot be accurately predicted (A. 65-67, 99-102, 103-105, 253). Indeed, this record shows that this expert's own predictions as to the effect of pumping from two specified Cappaert wells were promptly disproved (A. 264-265, 267-268; Capp. Br. 75-76).

The net of the foregoing is that the government's case for protecting the pupfish by invoking the 1952 Proclamation as legal authority for regulating the Devil's Hole water level actually involves the assertion of a prior right to all underground water in the 4500 square mile aquifer that transmits water to, and hence affects, that water level.

Consequently, to give effect to the government's basic proposition here (U.S. Br. 19), that "the United States may, by reservation of public lands, also reserve such appurtenant unappropriated waters as are required to accomplish the purposes for which the federal reservation was created", it is necessary to construe the 1952 Proclamation as impliedly reserving all underground water from an area 4500 square miles in extent in order to protect the pupfish.

Yet that is the inevitable consequence of the government's contentions here, which read into the text of that Proclamation an "intent" to protect living species that simply cannot be gathered from its words, which further reads into that text a concern for endangered species that was never authoritatively expressed until

many, many years afterwards, and which reads out of that text the legal climate and the governing law then in effect and then understood to be in effect when the instrument in question was promulgated.

The Cappaerts do not need to invoke ebullient forensic exaggerations. It is unnecessary for them to stress the extent of the 4500 square mile aquifer that feeds underground water into Devil's Hole; it is amply sufficient for them to concentrate on the 21 sections on which the decree approved below limits their own pumping (Pet. App. No. 74-1340, p. xx). That is still an area more than three hundred times larger than the 40-acre tract that was alone reserved by the 1952 Proclamation.

Consequently, regardless of the full acreage actually affected by the ruling below, the vital point here is that no one knew in 1952, or could know then, just how far from Devil's Hole pumping of underground water would need to be limited in order to maintain the then water level therein. Indeed, as late as 1971, the government's expert hydrological witness incorrectly estimated the effect on that water level of pumping from two specified wells on the Cappaerts' farm; see full references at Capp. Br. 17-18.

In short, not even a highly qualified expert can predict with even reasonable certainty just what is involved in terms of scope and distance in the government's present claim to impliedly reserved water rights. It is that circumstance which raises such an ominous specter, pointed out to this Court by no less than eleven States who see their own future existence endangered thereby (Br. A. C. of Arizona and ten other States, p. 37):

> "Future federal water reservation of unlimited magnitudes would seriously undermine, if not eliminate,

> state water planning in many areas. Only if the claims of the Federal government are reasonably foreseeable under an equitable legal system, is it possible for State water planners to provide adequate water programs for the future that will encourage continued development of western lands public policy would seem to require at least this."

At the risk of some repetition, but in conformity with Mr. Justice Holmes' too little remembered comment that "we need education in the obvious more than investigation of the obscure" ("Law and the Court" in *Collected Legal Papers* [1921] 291, 292-293), the Cappaerts emphasize that the 1952 Proclamation relies for its authority only on the 1906 act for the preservation of American antiquities.

That measure by the very words of its authorization for reserving parcels of land, specifically adds that "the limits of which in all cases shall be confined to the smallest area compatible with the proper care and management of the objects to be protected" (Sec. 2, 16 U.S.C. §431; Pet. App. D1-D2).

The House Report on the measure emphasized the limited nature of the small reservations that it authorized (H. R. Rep. No. 2224, 59th Cong., 1st sess., p. 1; italics added):

> "There are scattered throughout the Southwest quite a large number of very interesting ruins. Many of these ruins are upon the public lands, and most of them are upon lands of but little present value. *The bill proposes to create small reservations reserving only so much land as may be absolutely necessary for the preservation of these interesting relics of prehistoric times.*"

And, on the House floor, the member in charge of the bill emphasized (40 Cong. Rec. 7888) that "The bill provides that it shall be the smallest area necessary for the care and maintenance of the objects to be preserved."

It bears renewed emphasis that the 1906 Act authorized the reservation of "parcels of land", and that it said absolutely nothing about reserved waters. Here again, this should not occasion surprise. Because, very obviously, preservation of the prehistoric ruins and artifacts that were the only expressed concern of Congress did not require water rights for their preservation.

One may therefore ask, Can it ever be supposed for a moment that the sponsors of the Act for the preservation of American antiquities even so much as imagined that their measure would some day be perverted to authorize what the courts below have approved here, the withdrawal of all underground water for many miles around to safeguard, not artifacts, not interesting prehistoric ruins, but living creatures in an underground pool that was alone reserved to the extent of a mere 40 acres?

To ask that question is of course to answer it.

Thus to the matters already read into the 1952 Proclamation by the government in this case there must now be added another, the virtually unlimited extent of the water withdrawal that it rests upon authority of the 1906 Act.

Obviously that Proclamation cannot properly be subjected to such cumulative distortion. Yet without each of four distinct rewritings—(1) inclusion of an unexpressed intent to protect living creatures; (2) retroac-

tive resort to public purposes never articulated until passage of legislation many years later; (3) disregard of the rule of law prevailing when it was promulgated, under which the United States owned no non-navigable water that it could reserve; and (4) expansible authority to reserve far more extensive tracts than the statute permits—without the aggregate of those four rewritings of the 1952 Proclamation, it is impossible to reach the result that the court below approved and for which the government is contending here.

That is why the Cappaerts say that the court below was wrong in deciding as it did, that the government's arguments in support of the judgment below are patently untenable, and that reversal is in consequence imperatively required.

II.

INASMUCH AS THE UNITED STATES DID NOT COMPLY WITH STATE PROCEDURES FOR ESTABLISHING THE EXISTENCE OF ITS WATER RIGHTS, AND DID NOT APPEAL FROM THE STATE ENGINEER'S GRANT OF PUMPING PERMITS TO THE CAPPAERTS, IT IS BARRED FROM ASSERTING THOSE IDENTICAL CLAIMS TO WATER IN A LATER INDEPENDENT ACTION.

The Cappaerts do not feel it necessary to argue at length under the foregoing heading.

First, the issue arising out of the participation of the United States in the proceedings before the Nevada State Engineer, its failure to appeal his decision, and its subsequent resort to an independent action in another forum, is, very definitely, in the present case.

The short answer to the government's efforts (U.S. Br. 42-43) to invoke the formalities of pleading in

an effort to spell out a waiver is that this issue was dealt with at length, and determined by, the court below (Pet. App. A13-A16). It was therefore available for review here.

The State of Nevada, intervenor below and petitioner here in No. 74-1304, presented that issue as the second of its two questions (Pet. No. 74-1304, p. 3):

> "2. Whether the federal government must comply with state procedure for establishing the existence and scope of any water right, implied reserved right or otherwise, which it desires to assert to the water beneath reserved and non-reserved land."

Within that formulation there was "fairly comprised" (Supreme Court Rules 23(1)(c) and 40(1)(d)(1)) the issue argued here as Point II by the State of Nevada (Nev. Br. 34-47), as Point IV by the Cappaerts (Capp. Br. 80-89), and as Point IV by the government (U.S. Br. 41-49), and that is so whatever terminology may be employed in doing so, whether *res judicata,* collateral estoppel, exclusivity of administrative remedy, or otherwise.

True, since the Cappaerts did not raise that issue in their own petition for certiorari, they would not have been free without more to raise it as an original proposition. But since it was squarely raised in Nevada's petition, which sought review of the identical judgment of which the Cappaerts complained in No. 74-1107, they consider themselves fully justified—and fully authorized—to deal with it at length themselves. It is an issue that is in the case, and it is an issue that has been properly brought here by another party to the same cause who complains of the same judgment.

Second, regardless of the label used to characterize the rule of law relied upon to show that the court below erred, that rule can be very succinctly stated: Is the United States bound by the results of a proceeding in which it participated fully?

But for the government's arguments here, the Cappaerts would have thought that this question called for a resounding affirmative answer. See *Drummond v. United States,* 324 U.S. 316, 318, where this Court said:

> "If the United States in fact employs counsel to represent its interests in a litigation or otherwise activity aids in its conduct, it is properly enough deemed to be a party and not a stranger to the litigation and bound by its results. Compare *United States v. Candelaria,* 271 U.S. 432; 16 F.2d 559, with *Logan v. United States,* 58 F.2d 697. But to bind the United States when is it not formally a party it must have a laboring oar in a controversy."

The United States undoubtedly had a laboring oar in the controversy before the State Engineer as to the right of the Cappaerts to pump underground water from wells on their farm. Indeed, its representatives actively participated in that controversy, presenting every issue of law and fact that is now involved here.

1. They filed formal protests under NRS 533.365 with the Nevada State Engineer alleging that the proposed pumping would endanger the Devil's Hole pupfish (A. 228-230, 269-280).

2. At the hearing, held under NRS 533.365, the representative of the United States invoked the 1952 Proclamation and entered it in evidence as an exhibit (A. 287, 306, 308).

3. He spoke at length about the situation of the pupfish (A. 286-288).

4. He cross-examined both of the Cappaerts' witnesses (Nev. St. Eng. Tr. 21-51).

5. He offered a witness on behalf of the National Park Service, as protestant (Nev. St. Eng. Tr. 51-65).

6. He then summed up the case in support of the Park Service's protests (A. 297-298).

It would be difficult even to imagine more actively aiding in the conduct of a litigation, or exerting any more labor on a laboring oar. At the commencement of the hearing, after setting forth the background of the proceedings, the State Engineer stated, "It is customary, and I have not heard objections, that the Protestant proceed first, then the Applicant proceeds" (A. 286). The government solicitor then proceeded with the government's protest (A. 286). At the conclusion of the hearing, the State Engineer, after first giving his reasons, ruled "that the protest to the applications that are the subject of this hearing are overruled" (A. 312). He then advised the government solicitor of the statutory appeal time (A. 313). Consequently the United States was bound by the result reached, and, having failed to appeal under the law providing for review of the State Engineer's determinations, was not free thereafter to seek a different result in another forum.

The Cappaerts remain of the view that *United States v. Silliman,* 167 F.2d 607 (C.A. 3), certiorari denied, 335 U.S. 825, supports the foregoing conclusion; that decision is explained in detail at Capp. Br. 86-89.

In this instance, also, the *Silliman* case is a controlling decision which the government answers with its ultimate accolade—perfect silence.

By way of implied rebuttal, it quotes (U.S. Br. 48) from *United States v. California* 332 U.S. 19, 40, the following:

> "The Government, which holds its interests here as elsewhere in trust for all the people, is not to be deprived of those interests by the ordinary court rules designed particularly for private disputes over individually owned pieces of property; and officers who have no authority at all to dispose of Government property cannot by their conduct cause the Government to lose its valuable rights by their acquiescence, laches, or failure to act."

If the foregoing passage has any relevance here, a matter admitting of more than a little doubt, then it was equally relevant, and equally applicable, to the result reached by the Third Circuit in the *Silliman* case, 167 F.2d 607. Perhaps it was for that reason that the Solicitor General sought certiorari to review the result. But this Court denied the writ. 335 U.S. 825.

Without further discussion, the Cappaerts content themselves with underscoring what eleven States of the Union have said on the precise issue in their brief *amici curiae* in the present case (Br. A. C. of Arizona and 10 other States, pp. 40-42), and, extending those comments to the margin so as to make them part of the present reply brief's text, adopt them as their own:

"It is submitted that under the above principles the United States should have been barred from asserting in this case reserved rights claims determined in the prior state administrative proceeding. Prior to the administrative hearing, the United States filed written protests on the basis that the pumping of the wells

would adversely affect the water in Devil's Hole and thus result in harm to the fish living in the pool. This objection was reiterated in detail at the hearing before the State Engineer. President Truman's proclamation and expert testimony on the hydrology of the Ash Meadow area were introduced by the government. The nature, value and extent of the competing interest of the federal government and adjacent land owners was thoroughly argued during the hearing. As the transcript reveals, the issue of the lowering of the water in Devil's Hole and the effect on the fish therein was thoroughly considered. Although the federal government did not specifically assert an implied reserved water right, the existence of a federal water right was considered, but it was concluded that one did not exist. After the State Engineer rendered his decision granting the applications, all parties were informed [A. 313] that they had thirty days in which to appeal according to Nevada's statutory procedures. These procedures have been held by the Supreme Court of Nevada to be the exclusive remedy for those aggrieved by a decision of the State Engineer, *Jahn v. Sixth Judicial District Court In and For Humboldt County, et al.*, 73 P.2d 499 (Nev. 1937) and by a federal court to fully comply with due process requirements, in that they provided any aggrieved party a full opportunity to be heard before a court of competent jurisdiction with right of appeal to the Supreme Court. *Humboldt Lovelock Irrigation Light & Power Co. v. Smith*, 25 F.Supp. 571 (D. Nev. 1930). The United States did not appeal. Approximately six months later the government filed its complaint in this case in the Federal District Court. Allowing the government to thus initiate a judicial action six months subsequent to the administrative deter-

mination and after a substantial investment by the individual defendant in reliance upon the administrative decision is to clearly violate the principles of collateral estoppel and to make meaningless the administrative order of the State Engineer and Nevada's statutory procedures to appeal the order.

"From the earliest times, water law has been state law. The states have systems of water law and procedures adapted to water supply, climate, and demand. The United States does not. The initial forum, therefore, to achieve coordination and accommodation of federal uses with state and private uses is properly the state court, or in the case of Nevada, the administrative adjudication procedure which substitutes in the first instance in place of a court, the State Engineer, expert in the area of water use, and from whose order an aggrieved party may appeal to the state courts. The opinion of this Court in the *Eagle County* case [401 U.S. 520], supports this position. Furthermore, this Court there set forth the proper method by which the federal government could obtain review of the state determinations as to its reserved rights claims:

> " '*All such questions*, including the volume and scope of a particular reserved right, are federal questions, which, *if preserved*, can be reviewed here after *final* judgment by a Colorado Court.' (Emphasis added).

"The logical meaning of 'if preserved' is that the United States must pursue state appeal procedures in order to 'preserve' its claims for review in federal court. Further emphasis is placed on state review when the Court referred to 'final judgment'. The implication is that the United States must pursue protection of its rights in State Courts, and must pursue its remedy to final State Court judgment *before* seeking Federal Court review."

CONCLUSION.

The Cappaerts are not insensible to the considerations involved in protecting pupfish from extinction. But if the public interest requires that the Cappaerts' farm be taken in order to provide such protection, then resort must be had to the statutes that authorize such taking by condemnation with resultant compensation (see the provisions listed at Capp. Br. 13-15), in order that, through taxation, the burden of what is taken in the public interest may be paid for by the public. *Louisville Bank v. Radford,* 295 U.S. 535, 602.

Accordingly, for the foregoing additional reasons, the judgment below should be reversed, with directions to dismiss the complaint.

Respectfully submitted.

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NOVEMBER 1975.